U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-A-

DATE: MAR. 1, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a registered nurse, seeks classification either as a member of the professions holding an advanced degree or as an individual of exceptional ability, and asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. LAW

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
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> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national

interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise...." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990) (IMMACT90), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't of Transp., 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must demonstrate that he or she seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that he or she will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, a petitioner must show that his or her past record justifies projections of future benefit to the national interest. *Id.* at 219. A petitioner's assurance that he or she will, in the future, serve the national interest cannot suffice to establish prospective national benefit. Furthermore, eligibility for the waiver must rest with the petitioner's own qualifications rather than with the position sought. Assertions regarding the overall importance of a petitioner's area of expertise are insufficient to corroborate eligibility for a national interest waiver. *Id.* at 220. At issue is whether a petitioner's contributions in the field are of such significance that she merits the special benefit of a national interest waiver, a benefit separate and distinct from the visa classification she seeks. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

II. ANALYSIS

A. Advanced Degree Professional

The regulation at 8 C.F.R. § 204.5(k)(2), in pertinent part, defines "profession" as follows:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

Section 101(a)(32) of the Act states that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." As discussed by the Director, at issue is whether a baccalaureate is the minimum requirement for entry into the occupation.

The Director's notice of intent to deny (NOID) referenced the U.S. Department of Labor (DOL) Occupational Outlook Handbook which indicates that "the minimum requirement for entry into the registered nurse occupation is not a baccalaureate degree." The Petitioner does not dispute the findings, but rather maintains through counsel that she is more specialized than a generalist gerontological nurse. The record contains various articles, such as the one from the website study.com entitled "Geriatric Nurse: Educational Requirements for Geriatric Nursing" which states that while a geriatric nurse practitioner must have an advanced degree, the required education for a geriatric registered nurse includes an associate's degree. The record does not contain any corroboration, such as a nurse practitioner license, to establish that the Petitioner is a nurse practitioner rather than a geriatric registered nurse. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As the minimum education requirement for a geriatric registered nurse is less than a bachelor's degree, the Petitioner does not qualify as a member of the professions.

B. Exceptional Ability

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F) sets forth the six criteria, at least three of which must be met in order to qualify as an individual of exceptional ability in the sciences, the arts, or business. As found by the Director, the Petitioner's diplomas, license and membership in the [redacted] are qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(A), (C), and (E).

The submission of evidence relating to at least three criteria does not, in and of itself, establish eligibility for this classification. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality" and that USCIS examines "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true."); *see also Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination).

The Director addressed the submitted evidence and found that it did not establish that the Petitioner has "a degree of expertise significantly above that ordinarily encountered." On appeal, the Petitioner relies on a September 2002 article from the website http://content.healthaffairs.org which states that "less than 1 percent (21,500) of the nation's 2.2 million practicing RNs are certified in geriatrics," as the basis to assert that because she "is only one of 21,500 nurses in the field with a [m]aster[']s

degree," she meets the definition of exceptional ability and "is proof that in the field of Nursing, she has reached that position which has not been achieved by her peers." First, as previously stated, the record does not contain any evidence that the Petitioner is certified in geriatrics. Second, the article does not say that only 21,500 nurses hold a master's degree, her level of education.

The Petitioner has not shown that her license as a nurse is above that required for her occupation such that it is reflective of a degree of expertise above that ordinarily encountered. The Petitioner's degree is higher than required for entry into her occupation. Nevertheless, while we acknowledge that the Petitioner holds a master's degree and has a New York State license, section 203(b)(2)(c) of the Act expressly states that "possession of a . . . diploma . . . or a license to practice . . . shall not by itself be considered sufficient evidence of such exceptional ability." The only remaining item which meets the regulatory criterion is her membership in the The Petitioner did not, however, submit any materials, such as membership requirements, to establish that it is indicative of a degree of experience significantly above that ordinarily encountered.

Upon review of the entire record, the evidence the Petitioner submitted has not established that she is a member of the professions holding an advanced degree or an individual of exceptional ability.

C. National Interest Waiver

The Petitioner has demonstrated that her work as a registered nurse is in an area of substantial intrinsic merit. It remains, then, to determine whether the proposed benefits of the Petitioner's employment will be national in scope and whether she will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The reference letters confirm that the Petitioner is a competent and dedicated nurse who is well regarded by her colleagues, but does not establish that the efforts of one nurse significantly contributes to national healthcare goals, nor that her work as an individual will further those objectives on a nationally significant level. For example, who worked with the Petitioner at affirmed that the Petitioner "has a valuable unique gift and demonstrates great passion for the elderly." In addition, the materials do not substantiate that her endeavors have resulted in significant benefits beyond her employers or set her apart from other competent and qualified registered nurses working in gerontology. Without evidence demonstrating that her work has affected the field as a whole, employment in a beneficial occupation does not, by itself, qualify the Petitioner for the national interest waiver. Accordingly, we find the record insufficient to show that the Petitioner has had some degree of influence on the field as a whole.

The Petitioner is correct that nursing is a Schedule A, Group I occupation. 20 C.F.R. § 656.5(a)(2). An employer seeking a labor certification for a Schedule A occupation may apply directly with USCIS rather than DOL pursuant to 20 C.F.R. § 656.15. Therefore, the labor certification process for which the Petitioner seeks a waiver is already expedited. In this case, the Petitioner has not explained how waiving that expedited process is in the national

interest. Moreover, the Petitioner has not shown that providing nursing services in her geographic area will translate into benefits for the United States that are national in scope.

For the reasons discussed above, the Petitioner has not established a past record of achievement at a level sufficient to waive the job offer requirement which, by law, normally attaches to the visa classification sought. While a petitioner need not demonstrate notoriety on the scale of national acclaim, the national interest waiver contemplates that his or her influence be national in scope. *NYSDOT*, 22 I&N Dec. at 217, n.3. Considering the record, the Petitioner has not established by a preponderance of the evidence that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of R-A-*, ID# 15765 (AAO Mar. 1, 2016)